

Alter ego trusts and divorce

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Matrimonial property regimes

- Marriage in community of property
- Marriage out of community of property
 - Marriage out of community of property and out of community of profit and loss
 - Marriage out of community of property with community of profit and loss
 - Marriage out of community of property with the accrual system (Matrimonial Property Act, 1984)

Accrual system

- S 3(1) Matrimonial Property Act:
 - At the dissolution of a marriage subject to the accrual system
 - the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse
 - acquires a claim against the other spouse or his/her estate
 - this claim is for an amount equal to half of the difference between the accrual of the spouses' respective estates

Redistribution of assets

- S 7(3) and (4) Divorce Act, 1979:
 - In a marriage concluded subject to complete separation of property prior to the commencement of the Matrimonial Property Act
 - a court may order that assets of one spouse be transferred to the other spouse
 - if the court deems it just and equitable to do so, particularly in light of the one spouse's contribution to the growth of the other spouse's estate

Badenhorst v Badenhorst 2006 (2) SA 255 (SCA)

- Mr & Mrs B married out of community of property prior to commencement of Matrimonial Property Act
- Mr B instituted divorce proceedings against Mrs B
- Mrs B requested a redistribution of assets i.t.o s 7 of the Divorce Act
- Mrs B asked that the asset value of an *inter vivos* trust, of which Mr B was a co-trustee, be considered along with the value of Mr B's personal estate

Badenhorst v Badenhorst 2006 (2)

SA 255 (SCA)

- Court *a quo* denied Mrs B's prayer regarding the alter ego trust
- SCA:
 - Mr B was in full control of the trust
 - Mr B used the trust to amass personal wealth
 - But for the trust, the trust's assets would have vested in Mr B's personal estate
 - The trust was Mr B's alter ego
 - Value of the trust's assets added to the value of Mr B's personal estate for determination of redistribution amount

Is the consideration of alter ego trust assets (or their value) to determine the patrimonial consequences of divorce limited to the making of redistribution orders under the Divorce Act where marriages were concluded subject to a complete separation of property, or can such consideration also occur with regard to other matrimonial property regimes?

BC v CC 2012 (5) SA 562 (ECP)

- Spouses married out of community of property subject to the accrual system
- Divorce proceedings
- Wife asked that asset value of an *inter vivos* trust be considered towards determining accrual of husband's estate
- Wife averred that trust was husband's alter ego

BC v CC 2012 (5) SA 562 (ECP)

- Husband argued that
 - consideration of trust's asset value is appropriate for purposes of redistribution order under Divorce Act, but is inappropriate for purposes of accrual claim under Matrimonial Property Act
 - Matrimonial Property Act does not vest a court with a discretion to include assets other than a spouse's personal assets in the determination of the accrual of such a spouse's estate

BC v CC 2012 (5) SA 562 (ECP)

■ Dambuza J:

- A trust's asset value can be considered to
 - determine the extent of a spouse's estate value for purposes of making a redistribution order under the Divorce Act and
 - determine the accrual of a spouse's estate for purposes of determining the other spouse's accrual claim under the Matrimonial Property Act
- In neither instance does a court exercise a discretion: it simply engages in a factual inquiry into a spouse's patrimonial position

MM v JM 2014 (4) SA 384 (KZP)

- Spouses married out of community of property subject to the accrual system
- Husband instituted divorce proceedings against wife
- Wife asked that asset value of an *inter vivos* trust be considered towards determining accrual of husband's estate
- Wife averred that trust was husband's alter ego

MM v JM 2014 (4) SA 384 (KZP)

■ Ploos van Amstel J:

- A redistribution order in terms of s 7(3) of the Divorce Act differs fundamentally from an accrual claim in terms of s 3 of the Matrimonial Property Act
- For a redistribution order the court will make an assessment of what it deems to be just
- For an accrual claim the court must apply the Matrimonial Property Act's strictly mathematical formula for the calculation of accrual

RP v DP 2014 (6) SA 243 (ECP)

- Alkema J supported Dambuza J in *BC v CC*:

'It also follows ... that the power of piercing ... the trust veil is derived from common law and not from any general discretion a court may have. It is a function quite separate from ... the exercise of discretion in making a redistribution order under s 7 of the Divorce Act 70 of 1979, and must not be confused or conflated with such power.'

WT v KT 2015 (3) SA 574 (SCA)

- Spouses married in community of property
- Husband instituted divorce proceedings against wife
- Wife averred that assets of an *inter vivos* trust constituted assets in the joint estate
- Wife averred that trust was husband's alter ego
- Court *a quo*, relying on *Badenhorst v Badenhorst*, ruled that the joint estate included trust assets

WT v KT 2015 (3) SA 574 (SCA)

■ Mayat AJA:

- Court *a quo*'s reliance on *Badenhorst* a misdirection
- *Badenhorst* concerned a redistribution of assets under the Divorce Act
- Judicial discretion
- Court has no comparable discretion when determining proprietary consequences of marriage in community of property

What can we conclude?

■ *Badenhorst v Badenhorst*:

- alter ego trust assets can be considered to determine the patrimonial consequences of divorce for purposes of making a redistribution order under the Divorce Act

■ *WT v KT*:

- alter ego trust assets cannot be considered to determine the patrimonial consequences of divorce where spouses married in community of property

■ *MM v JM*:

- alter ego trust assets cannot be considered to determine the patrimonial consequences of divorce where the spouses married out of community of property subject to the accrual system

A further problematic aspect of judgments such as *BC v CC* and *RP v DP* is the courts' engagement with alter ego (or abused) trusts (and 'piercing the veneer of the trust' or 'going behind the trust form') on the one hand, and sham trusts on the other hand

Van Zyl v Kaye 2014 (4) SA 452 (WCC)

- Binns-Ward J:
- A trust is a sham when
 - some or all of the requirements for its creation not met; or
 - the appearance that these requirements were met a dissimulation
- A trust is abused when
 - trustees mismanage a trust in a dishonest or unconscionable manner and invoke their mismanagement to evade a liability or avoid an obligation towards a 3rd party

Van Zyl v Kaye 2014 (4) SA 452 (WCC)

■ Binns-Ward J:

- Alter ego trusts must not be confused with sham trusts
- Piercing the trust veneer or going behind the trust form is an equitable remedy afforded to a 3rd party affected by trustees' unconscionable abuse of a trust
- Establishing that a trust is a sham and going behind the trust form entail fundamentally different undertakings
- When a trust is a sham, it does not exist and there is nothing to go behind

RP v DP 2014 (6) SA 243 (ECP)

Piercing the trust veil (or veneer) will happen ... in cases 'where the trust is a sham and for all practical purposes is the alter ego of the founder or trustee'

Thank you